LEGAL EAGLE

December 2023

In this issue:

Published by:
Office of the State Attorney
West Palm Beach, FL 33401
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Written Threats

The juvenile B.W.B. posted an image on Snapchat and sent it to a friend. The image portrayed the defendant in a black cap, wearing large black headphones, a red and black skull mask, black sunglasses, a black hoodie, and a pair of fingerless gloves. In his right hand, he is holding what appears to be a gun. The background is an American flag pinned to a blank wall. The text at the bottom of the photo reads, "Don't go to school tomorrow."

The police received a tip about a "threat" made by Defendant "to shoot up a school." The police met with him at his school. B.W.B. waived *Miranda* and spoke with the police. He admitted to sending the image but denied adding the text. He also told the police, "The gun was an airsoft toy gun." The police then asked him about a notebook he carried around. Defendant admitted to carrying around a notebook containing his thoughts on racial minorities and Jews, a kill list, and notes on the Columbine school shooting.

Lastly, the police searched the juvenile's school computer and found evidence he conducted many Google searches "related to school shootings and hate groups," including Columbine, Guns, Nazi, Terrorism, and Extremist. Police arrested B.W.B. and at the police station he admitted he was the person in the photo but denied adding the caption.

After trial Defendant moved for dismissal arguing there was no threat. The State responded it did not have to prove the image was a credible threat, but rather that a reasonable person would believe it to be a threat. The juvenile admitted the notebook was his, and the State established the image was sent from the juvenile's cellphone. Thus, the State had proven, at trial, that a reasonable person would be alarmed by the image.

The trial court found the image was an "expression of intention to inflict evil, injury or damage." "And [it found the image was] sufficient to cause alarm in reasonable persons." The trial court found whether the gun was "real" or not was irrelevant because "the overall image combined with the caption ... was sufficient to cause alarm in reasonable persons." On appeal, that ruling was affirmed.

Issue:

Must the State prove that the defendant intended to make a real threat, namely that he made a communication with the knowledge that it will be viewed as a threat? **Yes**

Communicating Threats:

Section 836.10(2), F.S. provides:
(2) It is unlawful for any person to

Officers should consult with their agency advisors to confirm the interpretation provided in this publication and to what extent it will affect their actions. **Past issues of the Legal Eagle are available at //SA15.org under "Resources."**

send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to:

(a) Kill or to do bodily harm to another person; or

(b) Conduct a mass shooting or an act of terrorism.

With regard to the *scienter* (criminal intent) element the Supreme Court's ruling in *Elonis v. United States*, (2015), is instructive. "The fact that the statute does not specify any required mental state, however, does not mean that none exists.... Although there are exceptions, the 'general rule' is that a guilty mind is 'a necessary element in the indictment and proof of every crime.*' United States v. Balint*, (S.Ct.1922). We therefore generally interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."

In *T.R.W. v. State*, (4DCA 2023), the Court ruled, "Following the reasoning of *Elonis*, a *mens rea* element must be read into section 836.10. A defendant must have intended to make a true threat, namely that he made a communication with the knowledge that it will be viewed as a threat."

Ninety days after the *T.R.W.* decision the U.S. Supreme Court decided *Counterman v. Colorado*, (S.Ct. 2023). The Court in reviewing a Colorado statute criminalizing online threats stated, "True threats of violence, everyone agrees, lie outside the bounds of the First Amendment's protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications."

"The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again, guided by our precedent, we hold that a ***recklessness*** standard is enough. Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim."

"In the threats context, it means that a speaker is aware that others could regard his statements as threatening violence and 'delivers them anyway.' … For reckless defendants have done more than make a bad mistake. *They have consciously accepted a substantial risk of inflicting serious harm*."

Court's Ruling:

"Here, the juvenile sent a Snapchat to a friend. The juvenile testified it was a joke, but the investigation revealed the juvenile 1. had conducted numerous searches 'related to school shootings and hate groups'; and 2. had a notebook containing a white supremacist speech, Columbine references, and 'a manifesto on how to carry out a school shooting.' "

"While the 'threat' burden of proof has evolved as times and laws have changed, the evidence here supported the trial court's finding of guilt. The trial court, after weighing the notebook and the juvenile's computer searches against the juvenile's claim it was a joke, found the juvenile intended to send a 'threat.' The record evidence supports the trial court's finding."

"In *T.R.W. v. State*, (4DCA 2023), we determined the State's burden was to prove a 'threat' under section 836.10 at the adjudication stage. We adopted the U.S. Supreme Court's standard in *Elonis v. United States*, (2015): the 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.' "

"We [held] that section 836.10 does contain a *mens rea* component. To prove the commission of a violation of section 836.10, the trier of fact must find that the defendant transmitted a communication *for the purpose of issuing a threat*, or with knowledge that the communication will be viewed as a threat. Our decision shifted the focus to the defendant's state of mind instead of the effect on the recipient."

"More recently, the United States Supreme Court decided *Counterman v. Colorado*, (2023). There, the Court considered both the defendant's mental state **and** the effect on the recipient in determining whether the government had proven its case. The Court held the government must prove 'the defendant had some subjective understanding of the threatening nature of his statements. *A mental state of recklessness is sufficient*.' [Thus,] the State need not prove any more demanding form of subjective intent to threaten another. This is the latest statement on the burden of proof concerning threats."

"Here, the trial court correctly relied on *Puy v. State*, (4DCA 2020), as it was the most recent discussion of what was required to

prove a threat, but its holding was limited to the procedural posture of the case. The trial court also correctly found the Snapchat was the juvenile's 'expression of intention to inflict evil, injury or damage,' thereby finding the requisite *mens rea*. One thing is certain, regardless of the test employed, the evidence in this case was sufficient to satisfy the tests of *Puy*, *T.R.W.*, and *Counterman*. We therefore affirm the trial court's finding of guilt."

Lessons Learned:

The important element in evaluating the suspect's actions, i.e., threat, is context. See, *Watts v. United States*, (S.Ct.1969) in which the defendant, alluding to the possibility of being drafted, stated to a group at a political gathering, "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Supreme Court held that "taken in context, and regarding the expressly *conditional* nature of the statement and the reaction of the listeners (laughter)," this was not the sort of statement prescribed by federal code.

However, in *Smith v State*, (2DCA 1988), Smith mailed out numerous letters containing an allegation that the paper upon which it was printed was treated with a "rare, lethal toxin for which there is no antidote." Smith never denied sending the letters, but instead described them as "a colossal hoax to draw attention to the corruption in the Sixth Judicial Circuit." Despite his disavowal of any intent to cause harm, and his apparent belief that an underlying tone of humor was recognizable from the face of the letters, Smith was convicted as charged.

The D.C.A. ruled that Smith's belief that his freedom of expression outweighs whatever likelihood may exist that his choice of language might tend to frighten some persons was wholly meritless.

"Resort to ... personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument. It is true that language of dissatisfaction is often vituperative, abusive, and inexact, but courts must exercise caution in distinguishing true threats from crude hyperbole—a judgment derived from examining the totality of the circumstances. In a society where the expression of opinion is given the fullest protection, public figures must expect criticism that may be untrue, unjustified, or hurtful. They need not, however, passively accept statements or conduct transcending mere criticism which threaten personal or family safety. Smith, with his 'poisoned' pen, crossed that threshold and he may not now claim constitutional insulation for his actions."

B.W.B. v. State
4th D.C.A.
(Nov. 15, 2023)

No matter how you observe...wishing you and yours a joyous and meaningful celebration.

U.S. Department of Justice
Federal Bureau of Investigation
Criminal Justice Information Services Division

Law Enforcement Suicide Data Collection

Task Force

The LESDC Task Force is comprised of the following national organizations and law enforcement representatives :

- Federal, state, local, and tribal agency representatives
- National Native American Law Enforcement Association
- Association of State Uniform Crime Reporting Programs
- International Association of Chiefs of Police
- Major Cities Chiefs Association
- National Sheriffs' Association
- Subject matter experts in the field of law enforcement mental health
- State Statistical Analysis Center Representative
- Executive Office for United States Attorneys
- The Bureau of Justice Statistics
- Blue H.E.L.P.
- Federal Bureau of Prisons

These representatives are instrumental in conceiving reporting requirements, data elements, and publication strategies and concepts.

"Courage is what it takes to stand up and speak. Courage is also what it takes to sit down and listen."

—Winston Churchill

The Law Enforcement Suicide Data Collection (LESDC) Act was signed into law on June 16, 2020, and charges the Attorney General, acting through the Director of the Federal Bureau of Investigation (FBI), to establish a data collection where law enforcement agencies may submit information about their officers who have died by or attempted to commit suicide for the purpose of compiling national statistics on these tragedies.

Scope

As established within the LESDC Act, the FBI will collect at least the following information for each current or former law enforcement officer who commits or attempts suicide:

- the circumstances and events that occurred before each suicide or attempted suicide;
- the general location of each suicide or attempted suicide;
- the demographic information of each law enforcement officer who commits or attempts suicide;
- the occupational category, including criminal investigator, corrections officer, line of duty officer, 911 dispatch operator, of each law enforcement officer who commits or attempts suicide; and
- the method used in each suicide or attempted suicide.

What Qualifies an Incident for Submission into the LESDC?

An incident will be applicable for submission if the following terms apply:

- The incident is submitted by a law enforcement agency, which is defined within the LESDC Act as "a federal, state, local, or tribal agency engaged in the prevention, detection, or investigation, prosecution, or adjudication of any violation of the criminal laws of the United States, a state, tribal, or a political subdivision of a state."
- The subject of the incident is a law enforcement officer, which is defined within the LESDC Act as "any current or former officer (including a correctional officer), agent, or employee of the United States, a state, Indian tribe, or a political subdivision of a state authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of the criminal laws of the United States, a state, Indian tribe, or a political subdivision of a state."
- The incident occurred within a "state," which is defined in the LESDC Act as "each of the several states, the District of Columbia, and any commonwealth, territory, or possession of the United States."

LESDC Data Elements

The LESDC includes (but is not limited to) the following data elements:

- Type of incident—suicide or attempted suicide

Administrative Data

- Originating agency identifier number (agency name and address information)
- Occupation of individual

Personal Data Relative to the Incident

- Age at time of suicide or attempted suicide
- Demographics
- Race (all that apply)
- Total law enforcement work experience
- Position status at time of incident
- Military veteran and branch of service
- Marital status and number of children

General Data Pertaining to the Incident

- Location of incident
- Type of location
- Manner of suicide or attempted suicide
- Was the incident a murder/suicide or attempted murder/suicide
  - If yes, how many victims and type of victims
- If applicable, type of notification left

Circumstances

- Incident information (potential factors known prior to incident)
- Individual self-reporting information (potential factors made known prior to incident)
- Agency awareness information (potential factors documented within the employing agency)
- Additional information

Wellness Policy and Training

- Health and wellness available to agency employees (as applicable)

Submission of Data

Agencies began submitting incident information to the LESDC on January 1, 2022, via the Law Enforcement Enterprise Portal at www.cjis.gov. Applicable incidents are those that occur on January 1, 2022, and after.

Submissions to the LESDC are voluntary unless state-specific legislation exists that mandates an agency to report applicable data.

Key Events:

June 2020

The LESDC Act was signed into law.

January 2021

The LESDC Task Force convened for the first in a series of meetings.

June 2021 – October 2021

The LESDC pilot study.

January 2022

The LESDC will begin collecting data from agencies nationwide.

June 2022

The FBI will publish the first LESDC report.

Authority: The collection of this information is authorized under the Law Enforcement Suicide Data Collection Act, 34 U.S.C. § 50701; 28 U.S.C. § 534; 34 U.S.C. § 10211; 44 U.S.C. § 3101; and the general record keeping provision of the Administrative Procedures Act (5 U.S.C. § 301). Providing your contact information is voluntary; however, failure to provide your contact information may inhibit the FBI's ability to verify or clarify information in your incident submission.

Contact Information

Attention: Crime and Law Enforcement Statistics Unit
Email: LESDC@fbi.gov
LESDC Phone: 304-625-5370

Federal Bureau of Investigation | Criminal Justice Information Services Division | 1000 Custer Hollow Road | Clarksburg, WV 26306

Rev. 08032022

Recent Case Law

K-9 Deployment

Cory Jarvela drank a half-dozen rum-and-cokes, and around 1 a.m. he drove his Chevy Silverado to a gas station to buy cigarettes. The store clerk called the police to report that "a drunk guy" had just left driving a black Silverado. Officer Robert Trevino spotted the Silverado almost immediately, speeding and drifting over the road's center line. Officer gave chase. Jarvela sped up outside of town, leading Officer on an extended chase. After about five minutes, the road turned to gravel, and the Silverado struck a tree head-on. Jarvela then fled on foot into a darkened area of trees, bushes, and chest-high weeds and grass. Rather than pursue into the darkness, Officer called for backup. Deputy Richard Houk and his K-9, Argo, arrived thirteen minutes later.

Houk choked up on Argo's 15-foot leash, keeping the dog within five or ten feet. Then he and Argo began searching the area, with Houk shining his flashlight as they went. After about five minutes, Argo found a shoe and a white t-shirt in the grass; a few seconds later, the grass around Argo (who was not then visible) began to move around. Moments later Jarvela was visible in the weeds as he wrestled with Argo, who was clinging to Jarvela's right arm.

Jarvela rolled his body (over 200 pounds) on top of Argo's body (about 65 pounds), as Houk yelled at Jarvela, "Get on your stomach right now. Get down on the ground right now. On your stomach now." Rather than comply Jarvela attempted to choke out Argo. Using his Taser, Houk finally subdued Jarvela.

Jarvela brought suit under 42 U.S.C. § 1983, asserting claims of excessive force. The trial court granted summary judgment to all the other officers but denied Houk the same. On appeal that ruling was reversed.

Issue:

Did the use of the police dog constitute excessive force in the course of Jarvela's arrest? **No**.

Bite and Hold:

"Dogs in the canine unit were trained to 'bite and hold' a suspect. This method of training is employed by many other police departments throughout the country. The distinctive aspect of this training method is its aggressive nature: unless the handler countermands his order, the dog will seek to seize a suspect even if that individual complies with the officer's orders. Thus, injury to the apprehended suspect is often inevitable." *Kerr v. City of West Palm Beach*, (11 Cir. 1989).

"The severity of an apprehended suspect's injuries can be reduced if the handler has *complete control over the actions of his dog*. With such control, the handler can recall or restrain the dog before a bite even occurs. Alternately, the handler can quickly remove the dog from the apprehended suspect, minimizing the possibility that the suspect will be further injured in an ensuing struggle." *Baker v. Cohen*, (M.D. Fla. 2010).

In a case with very similar facts the United States District Court, Middle District of Florida, ruled: "The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the right to be free from the use of excessive force in the course of an arrest. It was *reasonable* for Ofcr. Ahler to believe Pace posed an immediate threat to his safety and the safety of others. Pace's reckless driving while attempting to evade capture posed a danger to the officers trying to apprehend him. Pace again demonstrated desperation and a disregard for his own safety and that of the officers when he ran into the dark, wet, root-entangled mangrove swamp in an effort to hide. It was difficult for Ofcr. Ahler to see Pace, including his hands, which at one point were underwater and wrapped around K-9 Brix. It was not unreasonable, therefore, for Ahler to believe Pace could be concealing a weapon."

"While Pace's injuries were severe, the undisputed material facts demonstrate that the use of K-9 force, and the severity of Pace's injuries, were the direct result of Pace's decision to flee and hide in the dark, densely vegetated mangrove swamp to avoid apprehension. *The bite-and-hold training method is not unconstitutional*. Nor is it objectionably unreasonable. *Pace v. City of Palmetto*, (M.D. Fla. 2007).

Court's Ruling:

"Jarvela argues that Houk used excessive force in the course of Jarvela's arrest, in violation of the

Fourth Amendment. Force is excessive when it is 'objectively unreasonable.' When applying that standard, we consider the amount of force used, on the one hand, and 1. the severity of the crime at issue, 2. whether the suspect posed an immediate threat to the safety of the officers or others, and 3. whether the suspect was actively resisting arrest or attempting to evade arrest by flight, on the other.

Here, for purposes of this determination, we divide Houk's encounter with Jarvela into two phases: a tracking phase, which ended when Argo found Jarvela and first seized him by means of a bite; and a contact phase, which ended when Jarvela was handcuffed."

"We begin with the question whether Houk violated Jarvela's constitutional rights in the tracking phase, in which the only force he used was a bite (or bite and hold, to be precise) from a well-trained police dog, namely Argo. Among the various forms of force available to law enforcement, that is a comparatively measured application of force, which 'does not carry with it a substantial risk of causing death or serious bodily harm.' *Robinette v. Barnes*, (6th Cir. 1988)."

"Meanwhile, the safety risks to the officers here were nearly identical to those in *Matthews v. Jones*, (6th Cir. 1994)—in which the force at issue was likewise a bite from a well-trained police dog. There, like here, Matthews drove while drunk and led police on a high-speed chase, which ended when the plaintiff fled into a 'wooded area in the dark of night.' And Matthew's 'extreme behavior' in seeking to elude arrest—behavior which was no different from Jarvela's pre-arrest behavior here—'provided cause for the officers to believe' that Matthews had potentially been involved in more serious criminal activity. We therefore held that 'Matthews posed a threat to the officers' safety' as they searched for him in the darkened woods. Suffice it to say that Jarvela posed the same threat to the officers here."

"Like the [trial] court, however, Jarvela emphasizes that, in *Matthews*, the officers 'called out orders for [the suspect] to surrender.' But the [trial] court and Jarvela both overlook that those warnings themselves came with a threat: that, if Matthews did not surrender, the officer would *unleash* the dog altogether. The same was true in [another case], where the officer warned the suspect and then unleashed the dog—which bit the suspect fatally, albeit constitutionally. *Those cases therefore do not support the proposition that an officer must always shout a verbal warning before tracking a suspect with a dog that the officer* ***keeps on a leash***."

Moreover, as *Robinette* illustrates, we see no reason to think that the warn-then-unleash approach is on balance less forceful than the approach Houk employed here—which was to omit the warning and to keep Argo on a fairly tight leash. 'There is a vast difference' between those two approaches; each has its pros and cons, depending on the circumstances. And the warn-then-unleash approach can elevate risk for officer and suspect alike: for the officer, because the shouted warning reveals the officer's location; and for the suspect, because the dog will be beyond the officer's control when the dog finds him. *Both approaches, however, fall within accepted police practice; and we would seriously overstep our judicial role if we were to hold that officers in every instance must adopt one approach or the other."*

"*We therefore hold that the Constitution does not require a canine handler always to shout out a warning to a fleeing suspect*. See also, *Crenshaw v. Lister*, (11th Cir. 2009) … And we hold that, under the circumstances facing the officers here, Houk did not violate the Constitution when he chose not to shout a verbal warning while tracking Jarvela with Argo on a leash. If Jarvela had wanted to surrender, he should not have fled on foot." REVERSED.

Lessons Learned:

"The mere recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." "We see no need to deprive police officers of the benefit of these useful tools (i.e., police dogs) solely because they carry the potential to cause serious harm."

The release of a dog trained to bite and hold was non-deadly force that did not violate a constitutional right. *Thomson v. Salt Lake County*, (Cir. 10, 2009).

However, failure to adequately train the agency's canine unit in the constitutional use of canine force; and/or failure to adequately supervise the performance of members of the canine unit to ensure that both misbehaving dogs, and officers exhibiting bad judgment in the use of canine force, received corrective training, are grounds for a civil rights lawsuit.

"Police dogs must be subject to continual, rigorous training in law enforcement techniques. Such training ensures that the dogs will continue to respond with alacrity to the commands of their handlers; without such training, the dogs' responsiveness to their handlers' commands will deteriorate, resulting in more frequent and more serious injuries to apprehended suspects than might otherwise occur." *Kerr v. City of West Palm Beach*, (11 Cir. 1989).

Despite the positive case law, keep in mind Florida Statute 776.06, "Deadly force by a law enforcement or correctional officer," which provides: "As applied to a law enforcement officer or correctional officer acting in the performance of his or her official duties, the term 'deadly force' means force that is likely to cause death or **great bodily harm**."

Clearly, a dog on the bite is force LIKELY to cause great bodily harm. Thus, the use of a police canine is deadly force, and the rationale of those cases should be kept in mind.

Jarvela v. Washtenaw County
U.S. Court of Appeals – 6th Cir.
(July 22, 2022)

DUI Roadside Tests

In the early morning hours, two officers observed Evelyn Barone speed past two marked police vehicles, drifting into another travel lane, and correcting herself. The officers effected a traffic stop. The arresting officer testified he immediately smelled alcohol when the defendant opened the window. He also noticed the defendant's eyes were glossy, her speech slurred, and she had trouble locating her license and proof of insurance. The defendant was unsteady on her feet when asked to exit the vehicle.

The arresting officer asked the defendant if she would do roadside sobriety exercises (FSE), and she said, "Yes." When the arresting officer asked her to begin the first exercise, the defendant asked, "Why do I have to do that?" The arresting officer told her that they needed to be sure she was "okay to drive."

The arresting officer then asked the defendant to stand behind her car, so he could begin the roadside sobriety exercises. She asked, "Why do I have to do that?" The officer answered, "I'm asking you to do some roadside sobriety exercises." She said, "I get it ... Like why?" He told her, "Because I can see signs of impairment. You're slurring your speech; I smell an odor of alcohol; the way you were driving."

After an evidentiary hearing, the trial court found the arresting officer observed signs of impairment and had *reasonable suspicion* to detain the defendant and ask her to perform the exercises as part of the DUI investigation. But the trial court concluded the arresting officer needed probable cause to "compel" the defendant to conduct the exercises. The trial court focused on the arresting officer's words that the defendant "needed" to do the exercises, rather than *obtaining her consent*. The trial court granted the motion to suppress. On appeal, that ruling was reversed.

Issue:

Is a defendant's consent to perform FSEs required when an officer has a reasonable suspicion that the defendant was DUI? **No**. May law enforcement compel field sobriety exercises based on *reasonable suspicion* alone, rather than probable cause? **Yes**.

Legal Basis for FSE:

The Florida Supreme Court noted, "When Taylor exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [Officer] with reasonable suspicion that a crime was being committed, i.e., DUI. The officer was entitled under section 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [His] request that Taylor perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights." *State v. Taylor*, (Fla.1995).

"In order to detain someone for a DUI investigation, the officer must have reasonable suspicion that the detainee committed the offense. See, *State v. Taylor,* (Fla.1995). A reasonable suspicion 'has a factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge and experience.' *State v. Davis*, (4DCA 2003)."

"Here, the officer made the same observations which we said in [an earlier case] constituted reasonable suspicion to detain the driver for a DUI investigation—the officer observed Defendant speeding, smelled an alcoholic beverage on Defendant's breath, and observed that Defendant's eyes were bloodshot and watery. …We hold that these observations provided sufficient reasonable suspicion to detain Defendant for the purpose of

conducting a DUI investigation." *State v. Castaneda*, (4DCA 2011).

"We must overrule the trial court's order since the question of consent concerning such physical tests has been held to be immaterial by the Florida Supreme Court in *State v. Mitchell*, (Fla.1971). Following the reasoning of the court in *Mitchell*, we hold that the police officer, after having observed [Defendant] drive in a weaving fashion and then noticing the smell of alcohol on his breath, had sufficient cause to believe that [Defendant] had committed a crime in the operation of a motor vehicle and could *require him* to take part in such physical sobriety tests." *State v. Liefert*, (2DCA 1971).

Court's Ruling:

"Courts have inconsistently applied either reasonable suspicion or probable cause to determine the legality of law enforcement's actions in conducting FSEs. Here, the trial court found the officers had reasonable suspicion to detain the defendant but needed probable cause to 'compel' the defendant to undertake the FSEs. In this latter decision, the trial court erred."

"The proper standard for a law enforcement officer to request FSEs is a reasonable suspicion that a driver has committed a law violation. If an officer has *reasonable suspicion* a defendant has committed a DUI, the defendant can be *required* to perform FSEs, and consent is immaterial. *State v. Johnson*, (5DCA 2023)."

"As the trial court correctly found, the arresting officer had a reasonable suspicion to temporarily detain the defendant for a DUI investigation and ask her to conduct the FSEs. See, *Taylor*, (recognizing an officer was authorized to request the defendant to perform FSEs where the officer had reasonable suspicion that a DUI was being committed)."

"As a practical matter, the idea that an officer can 'compel' the FSEs is inaccurate. An officer cannot compel a driver to cooperate in performing FSEs. But the Florida Supreme Court has held that a driver's refusal to submit to the exercises can be admissible at trial to show consciousness of guilt. An officer needs only a reasonable suspicion of a DUI to temporarily detain a driver and ask him or her to perform FSEs."

"The defendant's consent, however, is irrelevant to whether the temporary investigative detention is supported by a reasonable suspicion of criminal activity under *Terry v. Ohio*, (1968), and Florida's Stop and Frisk Law, section 901.151, F.S. See also, *Johnson*; *State v. Liefert*, (2DCA 1971) (holding that whether the defendant had consented to the physical sobriety tests was immaterial where the officer had 'sufficient cause' to believe the driver was intoxicated). Indeed, our Supreme Court and we have previously held that roadside FSEs are analyzed under the 'reasonable suspicion' standard for an investigative stop. REVERSED."

Lessons Learned:

The Florida Supreme Court in *Taylor* explained in detail why the trial court's ruling in the present case was incorrect. First, the Court cited Florida's Stop and Frisk statute: "When Taylor exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [Officer] with reasonable suspicion that a crime was being committed, i.e., DUI. The officer was entitled under section 901.151 to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest."

The Court then explained how a stop-and-frisk temporary detention related to a DUI stop. "Taylor's refusal [to perform FRE] does not constitute compelled self-incrimination, and its use at trial does not offend due process principles. The United States Supreme Court ruled in *South Dakota v. Neville*, (1983), that a suspect's refusal to submit to a post-arrest blood-alcohol test could be admitted at trial even though police failed to warn the suspect that refusal could be used against him in court. The Court reasoned that the Fifth Amendment privilege against compelled self-incrimination was inapplicable because, given the painless nature of the test, there was no compulsion to refuse, and the Due Process Clause was not violated because the suspect was not misled into believing that refusal was a 'safe harbor' free of adverse consequences, i.e., he was told that he could lose his license. We hold that Taylor's refusal to take the field sobriety tests was not elicited in violation of his statutory or constitutional rights and its use at trial does not offend constitutional principles. We further hold that the refusal is probative of the issue of consciousness of guilt. [Officer's] request that Taylor perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights."

State v. Barone
4th D.C.A.
(Nov. 8, 2023)

I.D. Testimony

Tyvonne Wiley was on trial for a series of robberies. Sergeant Darren Hull investigated the robberies. During Hull's testimony, the government played a surveillance video taken at the accomplice's house the day after one of the robberies. The video showed a man sitting on the porch holding a cell phone and removing a stack of cash from his pocket. Hull identified the man in the images as Wiley.

A second detective testified similarly. When the government showed him the photographs he had taken of Wiley, the detective identified Wiley in the photographs, noting that Wiley had a tattoo under his left eye, a ninja turtle tattoo on the side of his right eye, and a tattoo of a dollar sign on his forehead.

The accomplice also testified. The government showed him the same surveillance video it had shown to the detectives. He identified the man in the video as Wiley and noted that Wiley was holding a stack of money. He also identified Wiley in the courtroom.

In addition to the testimony, the government introduced evidence showing that Wiley's fingerprints and DNA were found on the masks recovered from the accomplice's house and that his DNA was found on the gun recovered from his car.

Issue:

Was it error for the law enforcement officers to give lay opinion testimony identifying Wiley in the surveillance footage presented at trial when the officers did not become familiar with Wiley until after his arrest? **No**.

Identification:

It is important to recognize the distinction between an eyewitness identification testimony, as opposed to a witness viewing a video or photograph and providing opinion testimony that it is the accused's image. The latter testimony may infringe on the province of the jury, as they can view the image and reach their conclusion as the trier of the facts. In *Ruffin v. State*, (5DCA 1989), officers were allowed to testify, over objection, that in their opinion Ruffin was the man in the videotape. The D.C.A. ruled this was an invasion of the province of the jury. When factual determinations are within the realm of an ordinary juror's knowledge and experience, such determinations and the conclusions to be drawn therefrom must be made by the jury. *The officers were not eyewitnesses to the crime*, they did not have any special familiarity with Ruffin, and they were not qualified as any type of experts in identification.

A witness may testify as to the identification of persons depicted in photographs or on video when the witness is in a *better position than the jurors* to make that identification. See, *State v. Cordia*, (2DCA 1990) (holding that officers' identification of the defendant's voice on a recording was admissible when the officers were familiar with the defendant's voice from working with him in the past); *Johnson v. State*, (4DCA 2012) (holding that there was no error in admitting a detective's identification of the defendant as the individual in a surveillance video when there was evidence that the defendant had changed his appearance before trial by bleaching his skin after the event recorded in the video and that the detective had a personal encounter with the defendant shortly after the event and before he changed his appearance).

When a witness identifies an individual before a trial, section 90.801(2)(c) provides that the out-of-court statements of identification made after the witness has perceived the individual are excluded from the definition of hearsay. Therefore, the out-of-court statement of identification is admissible in court to prove the truth of the matter asserted, e.g., to prove that the person identified was the person who committed the act.

Section 90.801(2)(c) also recognizes that an identification made shortly after a crime, accident, or event is more reliable in most situations than identifications made at a later time. See, *State v. Freber*, (Fla.1978). The subsection applies regardless of whether the declarant identifies the individual in court. However, the witness needs to testify in court concerning the identification and be subject to cross-examination concerning the prior identification. If the person making the out-of-court identification does not testify during the trial, evidence of the identification is not admissible.

In *United States v. Owens*, (S.Ct.1988), the United States Supreme Court found the "subject to cross-examination" requirement was satisfied when the witness testified at trial that he remembered making a statement of identification to a law enforcement officer but could not remember the details concerning the crime or the person who committed it. The *Owens* decision was premised on the principle that a witness would ordinarily be subject to cross-examination if he/she is placed on the witness stand under oath and

responds willingly to questions.

Accordingly, the detectives identifying the defendant from a photo or video are not eyewitnesses but rather lay witnesses providing their opinion regarding the subject of the image. F.S. 90.701 - Opinion testimony of lay witnesses, provides, "If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when…the opinions and inferences do not require a special knowledge, skill, experience, or training." (i.e. an expert). In *Fino v. Nodine*, (4DCA 1994), the DCA held that the kind of opinion testimony by lay witnesses admissible under section 90.701 is usually limited to things related to perception: e.g., "distance, time, size, weight, form, and identity."

Court's Ruling:

"We have explained that lay opinion identification testimony may be helpful to the jury where ... there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."

"Perhaps [the] most critical [factor] to this determination is the witness's level of familiarity with the defendant's appearance. On one end of the spectrum, 'familiarity derived from a witness's close relationship to, or substantial and sustained contact with, the defendant weighs heavily in favor of admitting the witness's identification testimony.' On the other end, 'knowledge of the defendant's appearance based entirely on the witness's review of photographs ... is not based on anything more than the evidence the jury would have before it at trial. Other considerations include the witness' familiarity with the defendant's appearance at the time the surveillance photographs were taken."

"Here, the officers' familiarity with Wiley lands somewhere in the middle. Although it falls short of the 'close relationship ... or substantial and sustained contact' both officers were present when Wiley was arrested just a day after the surveillance footage was captured and thus had more familiarity with Wiley's appearance at that time than the jury. But we need not decide whether the officers' post-arrest familiarity with Wiley was sufficient to permit them to identify him at trial. Assuming that the [trial] court erred by admitting the lay opinion identification testimony, Wiley cannot show that his substantial rights were affected. 'A substantial right is affected if the appealing party can show that there is a reasonable probability that there would have been a different result had there been no error.' Wiley cannot make this showing because the officers' identification testimony was not the only evidence linking Wiley to the robberies."

"For one thing, Wiley's codefendant Starling—who knew Wiley personally and spent considerable time with him in the two months preceding the surveillance footage and Wiley's arrest—confirmed that Wiley was at Starling's house on the day the surveillance footage was taken. Starling identified Wiley as the man in the video. He also noted that Wiley was holding a cell phone in the video and took money out of his pocket. Additionally, defense counsel acknowledged at trial that Wiley was the person in the video."

"For another, the government presented additional evidence linking Wiley to the robberies. Starling testified that Wiley paid him to drive Wiley to two retail stores, where Wiley, carrying a gun and a mask, got out of the car to rob the stores. When police recovered two masks from Starling's house and a gun from Starling's car, Starling identified them as the items Wiley used during the robberies. Wiley's fingerprints and DNA were found on the masks, and his DNA was found on the gun recovered from Starling's car. Considering Starling's testimony identifying Wiley in the surveillance footage and the substantial evidence establishing Wiley's involvement in the robberies, Wiley cannot show that the admission of [Officers'] testimony affected his substantial rights. For the above reasons, we affirm Wiley's convictions."

Lessons Learned:

As a reminder, Section 92.70, F.S., provides a procedure for an independent administrator to conduct a live lineup or photo lineup.

Section 90.801 does not affect the constitutional requirements of pre-trial identifications. Section 90.402 provides that otherwise relevant evidence is inadmissible when it is constitutionally infirm. Therefore, even though evidence is not excluded by section 90.801, it is inadmissible if it violates constitutional prohibitions. Thus, in-person line-ups conducted after charges have been filed without the defendant being represented by counsel and other identification procedures that are prejudicial to the defendant are inadmissible. See, *U.S. v. Wade*, (S.Ct.1967).

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U.S. Court of Appeal, 11th Cir.
(Aug. 29, 2023)